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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.701 OF 1989

State of Maharashtra) ... Appellant
(Orig. Complainant)

Versus

Fazauddin Mahamadalli Kurvale,)
age about 35 yrs. r/o. Shiral,)
Taluka Chiplun, Dist. Ratnagiri.) ... Respondent
(Orig. Accused)

Ms. U.V. Kejriwal, A.P.P. for the appellant-State.

None for the respondent-accused.

CORAM: SMT. RANJANA DESAI &
D.B. BHOSALE, JJ.

DATED: 15TH JUNE, 2005.

ORAL JUDGMENT:- (**Per Smt. Ranjana Desai, J.**)

1. The respondent (for convenience, "the accused") was tried in the Court of Sessions Judge, Ratnagiri, in Sessions Case No.39 of 1987 for the offence punishable under section 302 of the Indian Penal Code (for short, "the IPC"). By the impugned judgment and order dated 3/7/1989, the learned Sessions Judge acquitted the accused. Being aggrieved by the said judgment and order of acquittal, the State of Maharashtra has preferred this appeal.

2. The facts which give rise to the present appeal may be shortly stated. PW-1 Ibrahim is the first paternal

cousin of the accused. He is a resident of Village Shiral. The road to his house passes through the house of the accused. He used to park his scooter near the house of the accused. The incident in question took place on 18/5/1987. At the time of the incident, the accused and his wife Sharifa were the only members staying in the house of the accused. In the morning, PW-1 had gone to Chiplun. He returned by about 1.30 to 1.45 p.m. on scooter. When he entered the compound of the house of the accused to park his scooter, he found Sharifa, the wife of the accused lying on the ground with her face turned downwards. The accused was standing in the Padvi of the kitchen. PW-1 Ibrahim stopped his scooter. When he enquired with the accused, the accused told him that he had killed his wife. PW-1 Ibrahim found that Sharifa was bleeding from her head and she was not even in a position to speak. He could not pick her up and, therefore, he called PW-4 Husen, who was staying opposite his house. Husen came there. Both of them confined the accused in the house as they felt that the accused may create trouble. The accused appeared to be furious. They took Sharifa to the kitchen. They tried to give her water. But, she did not drink it. Within four to five minutes, she expired. Then, PW-1 Ibrahim went to village Konda on the scooter. From Konda, they gave a telephonic message to the Chiplun Police Station regarding this incident. PW-8 PSI Diwakar Sawant was attached to the Chiplun Police Station at the relevant time. He was informed about the fact that the accused

had assaulted his wife and he was asked to proceed to the scene of offence. At about 3.20 p.m., he went to the police station and read entry in the telephone register as well as in the station diary. He proceeded to village Shiral. He went to the house of the accused. PW-1 Ibrahim was present there. PW-1 Ibrahim's statement was recorded and the same was treated as complaint.

3. The investigation was set into motion on the basis of the complaint. Panchnama of the scene of offence was drawn. The accused was arrested. After completion of the investigation, the accused came to be charged as aforesaid.

4. In support of its case, the prosecution has examined as many as eight witnesses. The prosecution has not examined any eye witness. The prosecution story basically rests on the evidence of PW-1 Ibrahim, the complainant and PW-4 Husen. Motive is sought to be proved by leading the evidence of PW-2 Shakila, sister of the deceased, PW-7 Manubi, the mother of the deceased and PW-3 Ahmed uncle of the deceased. The details of investigation were given by PW-8 Diwakar Sawant, who was, at the relevant time, attached to the Chiplun Police Station.

5. The defence of the accused was one of denial. He pleaded not guilty and claimed to be tried. Though initially the plea of insanity was not set up, after the

evidence was recorded and the case was adjourned for recording the statement of the accused, the advocate for the accused preferred an application stating that the mental condition of the accused is not good and his statement cannot be recorded. In view of this, the accused was sent for examination and vide medical certificate (Ex-35) tendered in the court on 19/6/1989, the Superintendent of Institute of Mental Health, Ratnagiri certified that the accused did not have delusions or hallucinations. The learned judge noted that the mental condition of the accused was sound. Statement of the accused was thereafter recorded under section 313 of the Criminal Procedure Code (for short, "the Code".)

6. After perusing the evidence on record, the learned Sessions Judge was of the view that the prosecution had failed to prove that the accused has committed murder of his wife. The learned Sessions Judge also came to a conclusion that the accused had proved that at the time of committing murder by reason of unsoundness of his mind, he was incapable of knowing the nature of the act and as such he was entitled to get benefit under section 84 of the IPC. In view of this, the learned Sessions Judge acquitted the accused and, hence, this appeal.

7. We have heard, at considerable length, Ms. Kejriwal, the learned A.P.P. appearing for the State in support of the appeal. The learned A.P.P. submitted that the

impugned judgment and order is perverse and, hence, it should be set aside and the accused should be convicted in accordance with law. The learned A.P.P. submitted that it is true that there is no eye witness but, according to her, the chain of circumstances is complete and it points directly to the guilt of the accused and no other hypothesis but that of the guilt of the accused is possible on the basis of the record. She submitted that therefore the learned Sessions Judge erred in acquitting the accused. The learned A.P.P. urged that the evidence of PW-1 Ibrahim and PW-4 Husen establishes the presence of the accused at the scene of the offence at the relevant time when the murder was committed. The accused was, in fact, confined by these witnesses in a room. These witnesses tried to give water to the deceased. They went and telephoned the police and, as such, their presence can hardly be doubted. Their evidence is cogent and consistent. There are no discrepancies and, therefore, it should have been accepted by the Sessions Judge. The learned A.P.P. further submitted that the relations between the accused and his wife were strained. About eight days prior to the incident, the accused had beaten up his wife which had resulted in bleeding injuries being caused to her. She had rushed to her mother. Her mother PW-7 Manubi has stated that the deceased had come to her eight days prior to the incident and she had told her that the accused had assaulted her. PW-7 Manubi's evidence on this point is corroborated by the evidence of PW-3 Ahmad, who is the uncle of the

deceased and PW-2 Shakila, sister of the deceased. Therefore, there is a strong motive to commit murder of the deceased. The learned A.P.P. further submitted that there is discovery of iron bar at the instance of the accused. The iron bar was found to have blood stains. The blood stains were also found on the clothes of the accused. The blood found on the clothes of the accused and the blood found on the iron bar, as per the chemical analyser's report, was human. These circumstances, according to the learned A.P.P. unmistakably establish the complicity of the accused and, therefore, she submitted that we should overturn the order of acquittal.

8. Though Shri Rajendra Tarunkar has been appointed to appear for the accused, he is not present in the court. However, with the assistance of the learned A.P.P., we have perused the evidence.

9. Before we deal with the evidence and the contentions of the learned A.P.P., we must note that we are dealing with an appeal against acquittal and, therefore, unless we find that the impugned judgment and order is perverse, we cannot interfere with it. Even if two views of the matter are possible, if the view taken by the learned Sessions Judge is a reasonably possible view, we cannot interfere with it. Keeping these principles in mind, we shall proceed to appreciate the evidence.

10. We must also, at the outset, refer to one more

feature of the present case. We find from the record that on behalf of the accused, the plea of insanity was taken belatedly. We have already noted that after the evidence was recorded and the case was adjourned for recording the statement of the accused, the advocate for the accused preferred an application stating that the mental condition of the accused was not good and his statement cannot be recorded. In view of this, the accused was sent for examination and vide medical certificate (Ex-35) submitted in the court on 19/6/1989, the Superintendent of Institute of Mental Health, Ratnagiri, certified that the mental condition of the accused was all right. The statement of the accused was then recorded. Some of the prosecution witnesses have, however, deposed about the unstable mental condition of the accused. PW-1 Ibrahim has stated in his cross-examination that the accused used to get fits of insanity and, thrice before the present incident, he was admitted in the mental hospital. At a time, he was treated for a month upto 3 months. According to him, during the fits of insanity, the accused never used to work and he used to run to attack others and, sometimes, he was required to be controlled by holding him. During these fits, the accused used to address others loudly and he used to utter anything he liked. The accused used to have altercation with people for no reason. This witness has further stated that whenever such incident used to take place the accused used to be admitted in the mental hospital and once his brother had admitted him in the

mental hospital. It is further stated by this witness that in 1985, the accused was discharged from mental hospital. He made efforts to see that the accused does some work. The accused did the business of selling vegetables but left that business just 15 days prior to the incident. According to this witness for about 15 days prior to the incident, the accused did not go out of the house and mix with anybody. During these 15 days, when he met him, the accused tried to attack him. According to this witness, he and the villagers wanted to admit him in the mental hospital but they thought that they should admit him in the mental hospital after Ramzan festival. This witness's narration about the mental condition of the accused will have to be accepted because he has stated that the accused confessed to him that he had killed his wife. If this witness wanted to save the accused, he would not have involved the accused in the murder.

11. PW-7 Manubi Damkar, the mother of the deceased has stated in the cross-examination that the accused used to get fits of insanity and, on the last occasion, the deceased had got him discharged from the hospital. Even the Investigating Officer PW-8 P.S.I. Sawant has stated that he had enquired with the witnesses about the mental condition of the accused and during the enquiry it was disclosed that the accused was in the mental hospital two years before the incident in question. He has stated that he had enquired with PW-1 Ibrahim, PW-7 Manubi

Damkar and PW-4 Husen about the mental condition of the accused. He, however, admitted that during the investigation of the case, the accused was not referred to any psychiatrist. From this evidence, it does appear that the accused was mentally unstable. Though the Investigating Officer had some idea about this, the accused was not referred to the doctor for examination during the course of investigation. The Investigating Officer seems to have lost sight of the provisions of Chapter XXV of the Code which contains provisions relating to the accused of unsound mind. The accused appears to have been examined only during the trial and the medical officer has opined that the accused is cured of mental decease. Therefore, whether the accused was of unsound mind when he committed the offence has not been examined at all. The learned Sessions Judge has, after considering the evidence on record, come to a conclusion that the accused had a history of insanity and was treated for the same to the knowledge of the Investigating Officer. However, the Investigating Officer did not send him for medical examination. The learned Sessions Judge has observed that if the accused had been subjected to medical examination immediately, in all probabilities, the evidence could be available to show that the acts attributed to the accused were committed by him when he was afflicted with mental insanity but there is no positive evidence available regarding the mental decease. On account of failure on

the part of the prosecution to collect the evidence and place it before the court as regards the mental condition of the accused, according to the learned Sessions Judge, a serious infirmity is created in the case of the prosecution. We concur with the learned Sessions Judge on this aspect. The Investigating Officer has failed in his duty. This infirmity has made the entire prosecution case weak and it is difficult for us to interfere with the order of acquittal passed in the backdrop of the above facts.

12. The learned Sessions Judge has on assessment of the evidence come to a conclusion that the prosecution has not proved that the accused committed the murder. He has at the same time held that the accused has proved that at the time of committing the act, by reason of unsoundness of mind, the accused was incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law and as such he is entitled to get benefit of doubt under section 84 of the IPC.

13. Section 84 of the IPC reads thus:

> "**84. Act of a person of unsound mind.** - Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that

he is doing what is either wrong or contrary to law."

To get benefit of section 84 of the IPC, it is necessary for the accused to prove that he was of unsound mind at the time when he committed the offence and the question of granting benefit would arise only when the court comes to the conclusion that the accused has committed the offence. Section 334 of the Code reads thus:

"**334. Judgment of acquittal on ground of unsoundness of mind. -** Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not."

14. A fair reading of these provisions indicates that unless the court comes to a conclusion that the accused has committed the offence, the question of granting benefit under section 84 of the IPC does not arise. In our opinion, once a finding is recorded that the accused

has not committed the offence, the question of acquitting him by resorting to section 84 of the IPC does not arise. The proper approach would be to hold, in the facts of this case, that the prosecution has failed to prove its case against the accused and the failure of the prosecution to get the accused medically examined despite knowledge of his insanity creates a glaring infirmity in the prosecution case which must also lead to his acquittal.

15. We shall now deal with the merits of the case. In the post-mortem notes (Ex-8), cause of death is given as injury to vital organ brain and haemorrhagic shock. Since the prosecution story rests on the circumstantial evidence, we must ascertain whether the chain of circumstances is complete and whether it points to the guilt of the accused. PW-1 Ibrahim is the first cousin of the accused. According to him, on the day of the incident, at about 1.30 to 1.45 p.m., he came to the scene of offence on his scooter and he found the deceased lying on the ground with her face turned downwards. The accused was standing in the padvi of the kitchen. When he enquired with the accused, the accused told him that he had killed his wife. PW-4 Husen is the neighbour of the accused. According to him, at the relevant time, his wife told him that he was called by PW-1 Ibrahim and, therefore, he went to the house of the accused. He found Sharifa lying on the ground. Accused was standing at the door. According to PW-4 Husen, when they asked the

accused as to why he had assaulted, he did not say anything.

16. In order to bring home the guilt of the accused, the prosecution is also relying on the extra judicial confession made by the accused to PW-1 Ibrahim. It is well settled that evidence of extra judicial confession is a weak type of evidence and needs corroboration. Though PW-1 Ibrahim says that the accused told him that he had killed his wife, PW-4 Husen says that when they asked the accused why he had assaulted, the accused did not speak anything. PW-4 Husen does not say that the accused told them that he had killed the deceased. If the accused had made such a declaration, PW-4 Husen would have stated so in his evidence. It is the prosecution case that PW-1 Ibrahim and PW-4 Husen were together. PW-1 Ibrahim speaks about the extra judicial confession but PW-4 Husen does not speak about it. This creates a doubt about the prosecution case regarding the extra judicial confession. We find it risky to rely on the extra judicial confession.

17. The prosecution has also relied on motive. We concur with the learned Sessions Judge that the prosecution has failed to establish the motive. It is true that about 8 days prior to the incident, the deceased had gone to the house of her mother as she had received a bleeding injury. PW-7 Manubi, the mother of the deceased has deposed about it. PW-2 Shakila, the

sister of the deceased has also deposed about it. However, it is significant to note that in her evidence PW-2 Shakila had stated that the deceased told her that she was assaulted by her husband but she had not complained like this earlier. Therefore, prior to this incident, there was no complaint from the deceased. PW-3 Ahmad has also deposed about this fact but it is pertinent to note that he has stated that the relations between the accused and the deceased were cordial. There is no evidence to establish that the accused was hard-pressed for money and, hence, he was harassing the deceased. Therefore, the prosecution has failed to establish its case that the relations between the accused and the deceased were strained.

18. This takes us to the evidence of discovery of blood stained iron bar at the instance of the accused. PW-1 Ibrahim has not stated that he had seen the iron bar. It is pertinent to note that the search of the house was conducted on 18/5/1987. PW-5 Vyankitesh More has been examined by the prosecution to prove the panchnama of the scene of offence. This panchnama is at Ex-14. This panchnama nowhere mentions that any iron bar was found in the house of the accused. In fact, in the cross-examination, this witness has stated that when they inspected the house, they found nothing except what is noted in the panchnama. He has not stated that the iron bar was found in the house nor is it mentioned in the panchnama. The memorandum recording the accused's

statement is at Ex-25A and the panchnama is at Ex-25B. These documents are proved by PW-8 PSI Diwakar Sawant. Surprisingly pancha PW-6 Vidyadhar has not said a word about the memorandum or discovery. As per this memorandum (Ex-25A) and the panchnama (Ex-25B), on 25/5/1987, the accused made a statement that he had concealed the iron bar on his Mala in the bunch of fire wood. Pursuant to the said statement, the police went to his house and the iron bar was recovered. It is difficult to accept this story. When the police had made panchnama of the scene of offence on 18/5/1987, they had visited the house of the accused. If the iron bar was in fact in the house, they would have found it on 18/5/1987. It is not clear from the record as to who was in possession of the house of the accused during 18/5/1987 to 25/5/1987. Therefore, it is very difficult to accept that the bar was found in the house of the accused and if, indeed, it was found, the possibility of it being planted cannot be ruled out. In our opinion, the discovery evidence has been rightly rejected by the learned judge.

19. In view of the above, it is clear that vital links in the chain of circumstances have been snapped. It is, therefore, hazardous to rely on the prosecution evidence to hold that the accused is guilty.

20. In view of the above, in our opinion, the impugned judgment and order of acquittal merits no interference.

We concur with the learned Sessions Judge that the prosecution has failed to prove its case against the accused. The view taken by the learned Sessions Judge on the merits of the case is the only possible view and, hence, there is no substance in the appeal. Appeal is rejected.

(SMT. RANJANA DESAI, J.)

(D. B. BHOSALE, J.)